

**ORIGINAL**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning	)	DA 91-577
Regulation of Satellite	)	45-DSS-MISC-93
Earth Stations	)	

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**REPLY COMMENTS OF DIRECTV, INC.**

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**I. INTRODUCTION AND SUMMARY**

The Commission has remained faithful to the language and intent of Section 207 of the Telecommunications Act of 1996 by proposing to preempt private restrictions on the placement and use of DBS antennas, a significant step toward making DBS services available to viewers living in planned developments, condominiums and apartment buildings. Representatives of homeowners associations, apartment owners, and condominium associations, having failed to convince Congress that their restrictions upon DBS dishes are reasonable in light of the federal interest in fostering competition to cable television, now urge the Commission to reduce the scope of Section 207, and weaken the preemption proposed in Section 25.104(f). DIRECTV, Inc., the nation's leading DBS service provider, is concerned by these attempts to interpret Section 207 narrowly and scale back the preemption of Section 25.104(f). First, some commenters allege that Section 207 allows all private restrictions on DBS antennas short of outright bans. The Commission has already found in this proceeding that any costs imposed on antenna owners harm the ability of DBS

to provide competition to cable television.<sup>1/</sup> The Commission should adhere to its proposal in the Further Notice to preempt all private restrictions on DBS antennas.

Second, several landlords and apartment building managers urge the Commission to exclude renters from the protections of Section 25.104(f). Nothing in Section 207 would allow the Commission to limit its preemption rule in this manner nor would federal policy be served by denying a significant number of potential viewers access to DBS services.

Third, some commenters present the Commission with examples of extreme or unanticipated applications of the preemption of Section 25.104(f). Rather than attempt to address all conceivable permutations now, the Commission should consider the precise parameters of the preemption over time, on a case-by-case basis and in the context of other ongoing rulemaking proceedings.

## **II. THE PROPOSED RULE CORRECTLY INTERPRETS SECTION 207**

Congress passed Section 207 of the Telecommunications Act of 1996 (the "Telecom Act") in order to remove both governmental and private restrictions on satellite antennas that hamper the ability of DBS services to compete with cable television.<sup>2/</sup> The Commission has heeded this Congressional directive, adopting revisions to its existing rule to

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1. *Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-78, IB Docket 95-59, at ¶ 41 (rel. March 11, 1996) (hereinafter referred to as "Order" or "Further Notice").
  2. *See* Telecom Act § 207 (directing FCC to preempt "restrictions" on a viewer's ability to receive DBS services); *see also* H.R. Rep. No. 204, 104th Cong., 1st Sess. 124 (1995).

preempt local governmental regulation of DBS dishes,<sup>3/</sup> and proposing to preempt private restrictions by adding Paragraph (f) to the rule.

While local governments will be able to rebut the presumption of preemption by demonstrating that the satellite antenna regulation in question advances legitimate and narrowly-tailored health or safety concerns,<sup>4/</sup> proposed Section 25.104(f) would irrebuttably preempt all private restrictions on DBS antennas.<sup>5/</sup> The language of Section 207 and the policies that motivated its adoption, as well as the record in this proceeding, support the Commission's tentative conclusion to adopt a *per se* preemption of private restrictions on DBS antennas.

Section 207 directs the Commission "to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of . . . direct broadcast satellite services."<sup>6/</sup> Congress directed the Commission to "prohibit" governmental and private restrictions; it did not adopt language of compromise or accommodation.<sup>7/</sup> Congress recognized that any burdens on potential DBS

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3. As DIRECTV has stated in its Petition for Reconsideration and Clarification, Section 207 requires that the Commission strengthen the preemption by adopting an irrebuttable presumption against local governmental regulation of DBS antennas.
  4. See 47 C.F.R. § 25.104(b)(2). In its Petition for Reconsideration filed in this proceeding, DIRECTV has asked the Commission to adopt an irrebuttable presumption against governmental regulation of DBS antennas, a rule that will more accurately implement Section 207.
  5. *Order* at ¶ 62
  6. Section 207 of the Telecom Act.
  7. Section 207 of the Telecom Act. The Report of the House Committee on Commerce indicates that the Commission is to preempt inconsistent private restrictions. H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 123.

subscribers -- whether applied by local governments or private entities -- will impede the federal interest in fostering competition to cable television.

Representatives of homeowners associations and like organizations urge the Commission to reduce the scope of the preemption. These commenters interpret Section 207 to allow most private restrictions, so long as they do not "diminish or weaken" the reception of DBS signals.<sup>8/</sup> The Reston Home Owners Association, for instance, contends that by using the word "impair" in Section 207, Congress intended the Commission to preempt a restriction only when it in fact prevents reception of satellite signals by a DBS antenna.<sup>9/</sup> Other homeowners associations argue that Section 207 permits private restrictions that control the location, placement and aesthetics of DBS dishes.<sup>10/</sup>

There is no basis for either interpretation of Section 207. First, the statutory language does not focus upon the ability of the antenna to receive signals, but rather directs the Commission to prohibit any restrictions that "impair a *viewer's* ability to receive video programming services."<sup>11/</sup> Section 207 makes no distinction among types of impairment; a viewer's ability to receive DBS services is impaired by an outright ban on satellite antennas, by limits on placement of the antenna that preclude a line of sight, or by procedures or regulations that make obtaining such a service more difficult, expensive or time-consuming than receiving other video services. Section 207 would not, for example, permit a private

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8. Comments of the Reston Home Owners Association ("Reston"), filed April 15, 1996.

9. See Comments of Silverman & Schild, L.L.P., filed April 16, 1996; Comments of Reston.

10. See, e.g., Comments of Avenel Community Association, Inc., filed April 1, 1996.

11. Telecom Act § 207 (emphasis added).

restriction to require a DBS subscriber to justify his antenna placement.<sup>12/</sup> The Commission must therefore dismiss the request of Silverman & Schild, a law firm representing homeowners associations, that the burden should be on the homeowner to prove that the DBS antenna cannot be installed elsewhere on the property.<sup>13/</sup>

Second, limiting the preemption of Section 207 to those restrictions that in fact prevent the reception of satellite signals would defeat Congress's policy objective. Restrictions that increase the cost of installing and maintaining satellite antennas reduce the ability of DBS to compete with cable television. Section 207 accords private restrictions no greater weight than local governmental regulations, and the Commission has already recognized in that context that "any costs imposed on users of small [satellite] antennas" are unreasonable and can restrict access to effective alternatives to cable television.<sup>14/</sup> The same rationale applies with equal, if not greater, effect to private restrictions. The record shows that homeowners association rules, for example, impose significant costs on potential DBS subscribers through application fees, appeal hearings, and location requirements.<sup>15/</sup> In

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12. As the Commission found in adopting its revisions to Section 25.104, requiring antenna users to justify the placement of the antenna places an unreasonable burden on the access to satellite signals. *See Order* at ¶¶ 23, 31. For this reason, the Commission adopted a rebuttable presumption against local regulation of small satellite antennas. *See* 47 C.F.R. § 25.104(b).

13. Comments of Silverman & Schild at 3 (suggesting that consumer should bear the burden of proving that restrictive covenant impairs his ability to receive DBS).

14. *See Order* at ¶¶ 41, 15.

15. *See, e.g.,* Comments of Satellite Broadcasting and Communications Association, filed April 15, 1996, at 20-23 (HOA required DBS subscriber to file application and then appeal decision interpreting its rules to prohibit satellite dishes); *see also* Comments of Virginia Run Community Association, filed April 16, 1996, at 1 ("Boards must be permitted to require notification of installations, develop an installation plan, specify acceptable methods of installation, and coordinate the overall activity.").

many cases, the restrictions take the form of outright bans on the installation of DBS antennas.<sup>16/</sup>

Only by adhering to its proposal to adopt a *per se* preemption of private restrictions of DBS antennas can the Commission effectuate Congress's intent and allow DBS to compete on an equal footing with cable television. As DIRECTV noted in its Comments to the Further Notice, Paragraph (f) should be clarified to reflect the *per se* preemption of private restrictions, as follows:

- (f) All restrictive covenants, encumbrances, home owners' association rules, and other nongovernmental restrictions affecting satellite antennas less than one meter in diameter used to receive video programming signals are hereby unenforceable.

### **III. SECTION 207 DOES NOT DISTINGUISH BETWEEN RENTERS AND OWNERS**

Several commenters ask that the Commission exclude residents of apartment buildings and other rental properties from the protections of Section 207.<sup>17/</sup> There is, however, nothing in the statute that would allow the Commission to fashion a preemption rule that distinguishes among viewers based upon their status as property owners.

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16. See, e.g., Comments of Dr. Roop L. Jindal, filed April 16, 1996 (attaching HOA's unexplained denial of application to install DBS dish); Comments of Mr. and Mrs. Jacob A. Sayler, filed April 16, 1996. The Saylers' letter leaves little doubt that potential DBS customers frustrated by time-consuming and complex procedures prescribed by a private restriction will instead subscribe to cable television. The Saylers recounted their inability to retain their DBS dish, installed behind their air-conditioning unit beside their home, because their homeowners association covenants preclude the installation of an antenna that is visible from any property -- even the subscriber's. Not surprisingly, the Saylers contacted the local cable television company after their homeowners association demanded that they remove their DBS antenna.

17. See, e.g., Joint Comments of National Apartment Association, et al., filed April 15, 1996; Comments of Martin L. Adams & Sons, filed April 15, 1996.

Section 207 simply directs the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services."<sup>18/</sup> Congress did not distinguish between those viewers who rent their homes or apartments, and those who own their residences. Nor do the policy objectives of Section 207 depend on the landholding status of the viewer; federal rights are not limited to landowners.

The National Apartment Association ("NAA") turns Section 207 on its head to justify the exclusion of renters from its protections.<sup>19/</sup> NAA contends that private restrictions -- even bans -- on DBS antennas are permissible so long as a viewer "can receive some form of video programming."<sup>20/</sup> Section 207 was enacted to allow DBS and other services to offer viewers an alternative to cable television - not to permit landlords or other private entities to select the service for those viewers.

Even if the Commission could somehow legally or practically fashion a rule that differentiates among viewers based on their ownership status,<sup>21/</sup> such a rule would severely damage Congress's goal of promoting competition to cable television. Nearly 25% of American television viewers reside in apartments, condominiums and other multiple dwelling units ("MDUs"). Congress surely did not intend that the Commission would implement Section 207 in a manner that would exclude such a significant portion of the viewing population.

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18. 1996 Telecom Act § 207.

19. See Joint Comments of NAA, et al. at 13.

20. *Id.*

21. For example, the Commission would need to adopt rules addressing the separate rights of fee simple owners, renters, condominium residents, cooperative members, and holders of other property rights.



Commenters representing the owners and managers of MDUs raise the specter of the Fifth Amendment to argue against the inclusion of renters within the preemption rule.<sup>22/</sup> Citing *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>23/</sup> these commenters allege that allowing tenants to install DBS dishes on rented property would amount to a taking under the Fifth Amendment.

The Fifth Amendment is not implicated by preempting lease and other private restrictions through Section 25.104(f). The holding in *Loretto* is "very narrow," and the Court explicitly noted that its decision did not impact the "power to regulate . . . the landlord-tenant relationship."<sup>24/</sup> In fact, the Court cited with approval its precedent upholding a regulation that required a landlord to install fire sprinklers in his building, a system far more intrusive than a DBS antenna.<sup>25/</sup> The Fifth Amendment simply is not a bar to FCC regulation of an existing landlord-tenant relationship.<sup>26/</sup>

Nor should the Commission distinguish among viewers based upon the supposed aesthetic impact of DBS antennas. One commenter complains that allowing apartment dwellers to install DBS dishes will "be a terrible detraction to the overall

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22. See Joint Comments of NAA at 3-6.

23. 458 U.S. 419 (1982).

24. *Id.* at 440.

25. *Id.*, citing *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946).

26. See *FCC v. Florida Power Corp.*, 480 U.S. 245, 252-253 (1987). In *Florida Power*, the Court upheld the Commission's regulation of pole attachment rates, distinguishing *Loretto* by noting that the landlord had already voluntarily entered into the relationship with the tenant: "The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license." *Id.* A renter cannot in any sense be considered an "interloper."

appearance of our properties."<sup>27/</sup> The Commission has already dismissed similar unfounded and unsupported claims by municipalities.<sup>28/</sup> In preempting all governmental aesthetic regulations of DBS, the Commission noted that similarly-sized items, such as mailboxes, basketball hoops and air conditioning units typically are not regulated. DIRECTV's 18-inch DBS antenna is no larger than various unregulated items commonly found on apartment balconies, such as tables, chairs, planters and barbecue grills.<sup>29/</sup>

#### **IV. THE COMMISSION SHOULD RESERVE JUDGMENT ON SOME ISSUES**

Several commenters ask the Commission to declare exemptions from the preemption of Section 25.104(f) for so-called "common areas,"<sup>30/</sup> exterior surfaces,<sup>31/</sup> or easements.<sup>32/</sup> These requests present interesting issues not yet contemplated by the Commission, and there is an insufficient record to tailor the rule to any one of these issues. These difficult questions should be answered through declaratory ruling petitions or in other Commission proceedings.

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27. Comments of Love Properties, filed April 23, 1996; *see also* Joint Comments of NAA, et al. (enclosing mock photograph of apartment building with DBS dishes on balconies).

28. *Order* at ¶ 28.

29. Admittedly, the Commission's proposal, which treats all dishes up to one meter identically, goes beyond the Congressional mandate, which is limited to DBS and does not include the larger dishes used by medium-power direct-to-home services.

30. Comments of Woodbridge Village Association, filed April 16, 1996.

31. Comments of McLean Chase Condominium Unit Owners Association, filed April 24, 1996.

32. Comments of National Trust for Historic Preservation, filed April 16, 1996.

The outcome of the Commission's proceeding to revise its cable and telephone inside wiring rules and policies<sup>33/</sup> will have significant implications for the extent to which Section 25.104(f) should preempt restrictions on the installation of DBS antennas in MDUs. As DIRECTV told the Commission in its comments in that proceeding, access to inside wiring "is particularly important to ensure that DBS companies are able to provide effective competition to cable operators for residents of apartments, condominiums, and other multiple-dwelling units."<sup>34/</sup> Of course, access to inside wiring will be useless to DIRECTV if the residents of MDUs cannot install or have access to DBS antennas.

Nor can the precise scope of the preemption of private restrictions be resolved in this general rulemaking proceeding as several commenters have requested. The National Trust for Historic Preservation, for example, asks the Commission to consider the impact of Section 25.104(f) upon the historic easements granted to the Trust in perpetuity in exchange for tax benefits.<sup>35/</sup> While the holding in *Loretto* does not support the Trust's claim that Section 25.104(f) is a taking in this context, the Trust may be able to present a compelling case for a more narrowly tailored exemption from the scope of the preemption rule. There is, however, no record upon which the Commission could grant such an exemption in this proceeding, nor is a general rulemaking the appropriate context for such an action.

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33. Telecommunications Services Inside Wiring and Customer Premises Equipment, CS Docket No. 95-184.

34. Comments of DIRECTV, filed in CS Docket 95-184, March 18, 1996.

35. Comments of National Trust for Historic Preservation.

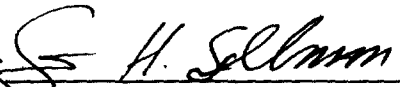
## V. CONCLUSION

The Commission has followed Congress's directive in proposing Section 25.104(f), a *per se* preemption of private restrictions on DBS antennas. The statutory language of section 207 does not contemplate that private restrictions will be accommodated at the expense of the federal objective in ensuring access to DBS services. The Commission has been faithful to Congress's intent in proposing the *per se* preemption of private restrictions affecting *all* viewers, and should adopt the rule, with the revisions recommended above.

Dated: May 6, 1996

Respectfully submitted,

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